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No. 80-1559

IN THE

Supreme Court of the United States

October Term, 1980

JAMES J. ZELLER,

Petitioner,

v.

MARCUS W. RANKIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Ninth Circuit Court of Appeals err in reversing a summary judgment by holding that a judge who acts in the clear, complete and knowing absence of personal jurisdiction loses his judicial immunity under common law or 42 U.S.C. § 1983?

II. Did the Ninth Circuit Court of Appeals err in reversing a summary judgment by holding that judicial immunity does not apply to a judge's prior, out-of-court non-judicial agreement to issue a guardianship order over a non-resident, and if so should this Court reach out to modify a purely alternative holding that would not change the result?

III. Can this Court modify the Kansas common law responsibility of Kansas judges for the pendent state law tort claims?

LIST OF ALL PARTIES

As filed in the United States District Court of Arizona, this action listed the following parties:

MARCUS W. RANKIN, Plaintiff; WAYNE HOWARD and JANE DOE HOWARD, his wife; JOSEPH ALEXANDER, SR., and ESTHER ALEXANDER, his wife; JOSEPH ALEXANDER, JR. and JANE DOE ALEXANDER, his wife; MICHAEL E. TRAUSCHT and JANE DOE TRAUSCHT, his wife; FREEDOM OF THOUGHT FOUNDATION, an Arizona corporation; WILLIAM J. RANKIN and WILMA E. RANKIN, his wife; JAMES J. ZELLER; S. MITCHELL MACK, JR. and JANE DOE MACK, his wife; GARY SCHARFF and JANE DOE SCHARFF, his wife; STEVE

LOTZ and JANE DOE LOTZ, his wife; GARY CONKLIN and JANE DOE CONKLIN, his wife; and LAWRENCE GUMBRINER and JANE DOE GUMBRINER, his wife, Defendants. William J. and Wilma E. Rankin were dismissed by settlement and stipulation.

In this petition for certiorari the parties are James J. Zeller, Petitioner v. Marcus W. Rankin, Respondent.

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OPINIONS BELOW

The opinions below are reported as *Rankin v. Howard*, 457 F. Supp. 70 (D. Ariz. 1978) (Pet. App. A, 1) and *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980) (Pet. App. A, 7).

JURISDICTION

The petition for certiorari seeks review of the decision of the Ninth Circuit Court of Appeals as filed on December 5, 1980 and reported as *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980) (Pet. App. A, 7).

Jurisdiction in the United States Supreme Court is provided by 28 U.S.C. § 1253(1), and certiorari is sought by

petitioner pursuant to Rule 17.1(a) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Kansas statutes, as constituted in December, 1976, limiting the jurisdiction of Kansas probate judges with respect to guardianship proceedings were K.S.A. § 59-301 and § 59-3001, *et seq.*, which are reproduced in petitioner's Appendix B.

In addition, the case involves the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." The case also involves but does not entirely rest on 42 U.S.C. § 1983, which provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .".

STATEMENT OF THE CASE

On Christmas Day, 1976, respondent Marcus Rankin was a 22-year old adult member of the Unification Church residing in Missouri. He had no contact whatsoever with the state of Kansas.

On that same Christmas morning, however, an Arizona attorney appeared at the home of Kansas probate judge

James J. Zeller through secret pre-arrangement, and then proceeded across the street to his courthouse to present an unverified declaration alleging that Marcus Rankin was mentally incompetent. There was no testimony by the proposed guardian, Marcus Rankin's father (contrary to the implications of petitioner's statement of the case), because he was then flying back to Missouri to lure his son into Kansas on a social visit after the guardianship order had been entered. Indeed, there was no testimony whatsoever from anyone who had ever met Marcus Rankin. Nevertheless, on the basis of an unverified declaration alleging brainwashing by the Unification Church, Judge Zeller found Marcus Rankin mentally incompetent and issued an order appointing his father temporary guardian.

On the strength of that order, Marcus Rankin was subsequently captured by four of the defendants and two Kansas sheriffs when his father's plane landed in Kansas on the pretense of a social visit. Marcus was handcuffed, taken to a house with boarded windows, and the next day put into a plane to Arizona where he was forced to undergo "deprogramming" for some nine days until he escaped.

Judge Zeller acknowledges that he knew that Marcus Rankin did not live in Kansas (Pet. Br. 17). As to the ward's whereabouts, Zeller answered interrogatories by stating "all I can recall that [the Arizona attorney] Mr. Howard told me was that Marcus Rankin would be in Pottowatomie County on December 25, 1976," that he "would be in the jurisdiction only temporarily," and that "they planned to take the proposed ward to Arizona." The order was in fact entered while the father was still flying to Missouri to get his son.[1]

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[1]There is no support in the record for petitioner's claim that Zeller was told Marcus Rankin would be in the county "at a time

Judge Zeller expressly "dispensed with" service of process on Marcus Rankin and the issuance of the "mandatory preliminary orders" and notice required by Kansas statutes K.S.A. §§ 59-3010 & 3012 (Pet. App. B, 6 & 8).

The choice of Zeller by the captors was no accident. The same Arizona attorney had presented virtually identical ex parte guardianship applications to him on at least four prior occasions, and each time Judge Zeller acted without notice to the proposed ward in violation of Kansas statutes and the due process clause of the Fourteenth Amendment. According to the affidavit of Marcus Rankin's father, Judge Zeller had specifically agreed in advance "to act favorably on such an application concerning Marc." *See* 633 F.2d at 849 n.15 (Pet. App. A, 19).

After extremely limited discovery, the district court granted summary judgment in favor of Judge Zeller, holding that he was immune *even if* he knew there was no personal jurisdiction for his guardianship order. 457 F. Supp. at 73 (Pet. App. A, 4). The Ninth Circuit reversed, holding that clear, complete and knowing absence of personal jurisdiction destroys judicial immunity. The Ninth Circuit found ample fact questions precluding summary judgment for Judge Zeller, especially when the only discovery from him was one set of interrogatories in which he objected to questions about personal jurisdiction. *See* 633 F.2d at 849 n.15 (Pet. App. A, 19-20).

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n.1 (cont'd)
certain," that Zeller "wait[ed] for that time to occur," or that he "determined respondent was physically present" in the county (Pet. Br. 3 & 17). We do not pause with this since it is a purely factual question adequately disposed of by the court below. *See* 633 F.2d at 849 & n.15 (Pet. App. A, 19-20).

REASONS FOR DENYING THE WRIT

I. *There Is No Conflict of Decision Nor Public Importance Warranting Review.*

A. *The Decision Accords With the Cases of This and Other Courts; It Conflicts With None.*

The basis of the Ninth Circuit's holding is simple and straightforward: "[T]he district court must consider the possibility that Judge Zeller lost his immunity by participating in a conspiracy to violate Rankin's civil rights through a nonjudicial agreement or a judicial act *in the clear and complete absence of personal jurisdiction*." 633 F.2d at 850 (Pet. App. A, 13) (emphasis added).

The conclusion follows directly and inescapably from *Bradley v. Fisher*, 80 U.S. 646, 651 (13 Wall. 335, 351), 20 L. Ed. 646, 651 (1872), where this Court held that judicial immunity is lost for acts in the "clear absence of all jurisdiction."[2] As the Ninth Circuit properly concluded, without personal jurisdiction there is *no* jurisdiction. 633 F.2d at 848-49 (Pet. App. A, 11), *citing Kulko v. Superior Court*, 436 U.S. 84, 91, 98 S. Ct. 1690, 1696, 56 L. Ed. 2d 132 (1978). The requirement of personal jurisdiction is "a consequence of territorial limitations on the power of respective States." *Hanson v. Denckla*, 357 U.S. 235, 251, 78 S. Ct. 1228, 1238, 2 L. Ed. 2d 1283 (1958). If judges were immune for usurping nationwide authority, "no citizen [in *any* state] would be safe from the machinations of secret tribunals, and the most sane member of the community

[2] *Bradley v. Fisher* involved a judge sentencing an attorney for contempt. This Court held that a judge was not liable, no matter what his error, where there was "jurisdiction of both subject and person," but it carefully distinguished the hypothetical situation in which "the court had proceeded without having any jurisdiction whatever over its attorneys." *Id.* at 651-52.

might be adjudged insane and landed in the madhouse." *In re Wellman*, 3 Kan. App. 100, 45 P. 726, 727 (1896).

Petitioner's reliance on *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978), is misplaced. That case upheld immunity where the court acted in excess but not total absence of subject matter jurisdiction, and there was no question regarding personal jurisdiction. *Stump* did not purport to change the *Bradley* standard requiring "jurisdiction of both subject and person." It certainly did not suggest that an Indiana judge would be immune for ordering the sterilization of an adult in another state like Missouri.

Judicial immunity requires at least plausible subject matter jurisdiction and personal jurisdiction. *See Duba v. McIntyre*, 501 F.2d 590 (8th Cir. 1974), *cert. denied*, 424 U.S. 975, 96 S. Ct. 1480, 47 L. Ed. 2d 745 (1976) ("The judge must have both jurisdiction over the person and subject matter if he is to be immune from suit"); *Ryan v. Scoggin*, 245 F.2d 54, 58 (10th Cir. 1957) (judicial immunity applies where "the court has jurisdiction of the subject matter and of the parties"); *O'Bryan v. Chandler*, 352 F.2d 987 (10th Cir. 1965), *cert. denied*, 384 U.S. 926, 86 S. Ct. 1444 (1966); *Cuiksa v. City of Mansfield*, 250 F.2d 700, 702 (6th Cir. 1957), *cert. denied*, 356 U.S. 937, 78 S. Ct. 779, 2 L. Ed. 2d 813 (1958) (judicial immunity applies "where jurisdiction exists over the subject matter and the defendant"). This is also the common law. *Pomeranz v. Class*, 82 Colo. 173, 257 P. 1086, 1090 (1927); Annot., 13 A.L.R. 1345 (1921); 32 Am. Jur. 2d *False Imprisonment* §§ 54, 57 & 58, at 118-21 (1967) ("Jurisdiction of the subject matter alone is not sufficient to protect the judge; he must also have

jurisdiction of the person and of the process issued.").

B. *The Rarity of Immunity Cases Involving Knowing or Reckless Abuse of Personal Jurisdiction Makes This Case Sufficiently Unique to Fall Short of the "Important Question" Standard.*

No case is cited from any jurisdiction suggesting even an arguable conflict with the decision of the Ninth Circuit under review. Indeed, the rare cases on point are unanimous in holding judges liable who act in the complete absence of personal jurisdiction. *Robinson v. Dow*, 20 F. Cas. 1005 (C.C.D.C. 1846) (judge liable for issuing an arrest warrant for a person beyond his jurisdiction); *Stuart v. Chapman*, 104 Me. 17, 70 A. 1069, 1072 (1908) (the commissioner has "no jurisdiction over the debtor's person, and no authority to issue a capias commanding his arrest and commitment to jail; and for so doing he is liable"); *McCarg v. Burr*, 186 N.Y. 467, 79 N.E. 715, 716 (1906) (judge liable because "he was proceeding without ever having acquired jurisdiction to try the plaintiff"); *Farish v. Smoot*, 58 So. 2d 534, 537 (Fla. 1952) (judge held liable for false arrest because "though having eyes with which to see and ears with which to hear, [he] wilfully failed and refused to inform himself fully in respect to the facts at a time when the slightest inquiry on his part would have revealed that the order he had determined to make would be in a case as to which he then had no jurisdiction, either as to the subject matter of the charge or the person of the accused").

The age and rarity of such cases demonstrate that judges have little difficulty meeting the century-old standard reaffirmed by the Ninth Circuit. There is no need to reassure the judges of this country that they are immune so long as

they act with colorable jurisdiction.

As noted by the Ninth Circuit Court of Appeals, there are ample facts requiring a trial to determine whether Judge Zeller in fact knew that he lacked all personal jurisdiction over Marcus Rankin, precluding summary judgment. The Ninth Circuit did not change the standard to be applied, but merely held that some further inquiry is required to establish the facts. That decision should not be disturbed.[3]

II. *The Alternative Holding Should Not Be Disturbed.*

As a separate and independent basis for its result, the Ninth Circuit held that a prior, out-of-court conspiracy was nonjudicial and therefore not immunized. Relying on the guardian's affidavit stating that Judge Zeller agreed in advance to rule favorably on the guardianship petition, and applying this Court's recent definition of "judicial" acts, the Ninth Circuit held that such an advance agreement destroys the expectation of judicial impartiality, is not normally performed by a judge, and is "the antithesis of the 'principled and fearless decision-making' that judicial immunity exists to protect." 633 F.2d at 847 & n.9 (Pet. App. A, 3-4 & 17-18). *See Stump v. Sparkman*, 435 U.S. 349, 362, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).

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[3] There is also a second separate and independent ground supporting the Ninth Circuit decision. Regardless of what immunity standard may apply to the claims arising under 42 U.S.C. § 1983, Kansas law governs its judges' liability for the pendent common law tort claims, and Kansas clearly holds its judges liable for acting without personal jurisdiction. *Brown v. Larimer*, 132 Kan. 81, 294 P. 906, 907 (1931). *See Beeler v. Beezley*, 126 Kan. 268, 267 P. 1112 (1928); *In re Wellman*, 3 Kan. App. 100, 45 P. 726, 727 (1896). This Court cannot impose on Kansas any lower standard for its own judges' common law torts. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

The Ninth Circuit's analysis is sound and fundamental to the whole concept of an independent judiciary. *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (trial by judge who was also one-man grand jury violates due process); *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980), *cert. dismissed*, 49 U.S.L.W. 3444 (Dec. 16, 1980) (No. 80-559) (judicial immunity does not apply to judge's prosecutional acts); *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979) (judge liable for acts as alderman).

There is no conflict among the Circuits. The Ninth Circuit adequately distinguished the differing posture of one Fifth Circuit case relied on by petitioner, and the other has nothing to do with judicial liability or immunity. *See* 633 F.2d at 846-48 n.9 (Pet. App. A, 3-4 & 17-18) and Pet. Br. 25-27, *citing Sparks v. Duval County Ranch Co., Inc.*, 604 F.2d 976, 978 (5th Cir. 1979) (*en banc*), *cert. denied*, 445 U.S. 943, 100 S. Ct. 1339, 63 L. Ed. 2d 777 (1980) and *In re Georgia Paneling Supply, Inc.*, 581 F.2d 520 (5th Cir. 1978), *cert. denied sub nom. Moore v. Brown*, 49 U.S.L.W. 3162 (1980) (motion for new trial under Rule 60).

We believe the Ninth Circuit's interpretation was correct, but in any event there is no need for the Court to reach out to consider a purely alternative holding that would not change the result, especially when this Court itself set the standard only three years ago.

CONCLUSION

The Ninth Circuit reached the correct result, in accordance with the decisions of this Court and the Circuit Courts. Certiorari should be denied.

Respectfully submitted,
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PROOF OF SERVICE

The undersigned Peter D. Baird, a member of the Bar of this Court and one of the counsel of record for respondent herein, hereby certifies that on the 2nd day of April, 1981, he caused to be served the foregoing Brief in Opposition to the Petition for Writ of Certiorari on all parties to this appeal by mailing copies thereof by ordinary mail, postage prepaid, addressed to their attorneys, as follows:

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